No. 12375

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

In replying to the Government's Brief, the issues presented by the Opening Brief of this Appellant will be discussed in the same order followed in the Opening Brief with a notation as to the place in the Opening Brief at which the issue is there discussed, together with a notation to the page in the Government's Brief at which the issue is discussed.

POINT I.

(Error I.)

The Evidence Was Insufficient to Establish the Offenses Charged as to Each Count of Indictment 20069 and Indictment No. 20604.

This Point is discussed as Point II of the Government's Brief, pages 15-19, it is discussed in our Opening Brief at pages 19-26.

Appellee first cites Sub-paragraph (18), Title 8, which Appellant is accused of violating, and then refers to certain civil cases, which we shall consider, on academic principles of statutory construction, *i. e.,* "The language of the statute in this case is plain and there is no occasion for construction," and "if the language is clear and unambiguous, it must be accepted without modification, and without resort to construction or conjecture." These announced principles of construction are asserted to be drawn from the following cases: *Russell Motor Car Co. v. United States,* 261 U. S. 514; *In re Borchort,* 47 Fed. Supp. 387; *Sweet v. United States,* 228 Fed. 421 (cited by appellee as *Fleet v. United States.*)

The case of *Russell Motor Car Co. v. United States, supra,* involved the question of the executive power to cancel certain contracts for the production of anti-aircraft gun mounts following World War I; the statute involved empowered the President to "modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material." The Motor Car Co. contended that the statute above quoted applied "to private contracts alone, and affords no authority for the cancellation by the Government of its own contracts." The Court said: "It must be apparent, we

think, that the words of the provision, 'any existing or future contract' read with literal exactness include all contracts, whether private or governmental."

In re Borchort, 47 Fed. Supp. 387, another civil case, the District Court reviewed an order in a bankruptcy proceeding under the Frazier-Lemke Act; the Court had before it for consideration, Subsection (1) of Section 75, which provides: *"Existing* mortgages, liens, pledges, or encumbrances shall remain in full force and effect." The Court said in applying this Section: "Here, however, Petitioner did not hold an 'existing' lien at the time of bankrupts' adjudication. . . . The holder solely of a continuing crop mortgage has no interest or lien upon the land. The lien of such mortgage attaches only when the crop comes into actual existence (citing cases). The intention of Congress is to be sought for primarily in the language used, and if the language is clear and unambiguous, it must be accepted without modification, without resort to construction or conjecture."

In *Sweet v. United States* (C. C. A. 8), *supra,* the Court said:

"By the terms of the Enabling Act of the State of Utah, the United States granted sections (certain) in every township in that state to the state for the support of common schools. The act contained no exception or reservation of mineral lands from this grant." Certain lands within these sections were conveyed by the State of Utah, and the United States Government sought to quiet title to them in itself, on the ground that "the conveyed land was well-known coal land when the State of Utah was admitted into the Union; and for that reason never passed to the State; the lower court sustained the claim of the Govern-

ment, and the Circuit Court of Appeals reversed the lower court; in reversing, the Appellate Court stated: "Congress had the power to make or to withhold this grant in whole or in part. * * * Nevertheless it did not except or reserve mineral lands from the grant. And where a legislative body makes a plain grant or provision, and makes no exception to it, the legal presumption is that it intended to make none, and it is not the province of the courts to do so."

These civil cases present no analogy whatsoever to ours and have no application. Appellee even concedes that the statute does not reach all instances of false statements as to nationality status (pp. 16-17). Appellee states that "the word 'represent' requires that to ground the offense, there be an 'element' of seriousness to a statement that one is a citizen of the United States", and that "the false representations did not consist of words spoken as a mere boast or jest or to stop the prying of some busybody."

Appellee refers fragmentarily to *United States v. Achtner,* 144 F. 2d 49, and asserts concerning this case, at page 16 of his brief, that: "It only comments that words spoken as a mere boast or jest or to stop the prying of some busy-body are not criminal," under the statute.

The *Achtner* case goes far beyond this in its holdings. It holds that under the statute (p. 62) "the representation of citizenship must still be made to a person having some right to inquire or adequate reason to ascertain a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken * * * to stop the prying of some busy body, and the use of the words

'knowingly' and 'falsely' implies otherwise. * * * the word 'falsely', particularly in criminal statute suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously,' (cases cited) or 'with intent to defraud' * * *."

Appellee really contents himself in reply to our discussion of this point with the statement (Appellees' Brief p. 16): "The contention that it is insufficient (the evidence) boils down to a theory that the persons to whom the false representations were made in the first indictment, and the Police Department in the second, were not persons 'having good reason to inquire into the nationality status of the defendant.'" Appellee is completely in error with this synopsis of our position. At page 19 of our Brief, we have categorically set forth our basic contentions separately under the alphabetical headings of (a) through (f). These several basic contentions are all based on and drawn from the facts and opinions in the case of *United States v. Achtner, supra,* and by this court in *United States v. De Pratu,* 171 F. 2d 75, 76.

Singularly, Appellee has completely ignored our discussion of the opinion of this court in *United States v. De Pratu,* and makes no mention of it whatsoever. This court in the *De Pratu* case, on the appellant's contention that the proof did not "sufficiently show that his claims of U. S. Citizenship were material to the transactions at hand" said:

> "In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official

> duty * * * Obviously, appellant's claim of U. S. Citizenship in response to such inquiry could not be said to have been made * * * to 'stop the prying of some busy body.' "

Both in the *De Pratu* case, *supra,* and the *Achtner* case, citizenship was material to the transactions at hand. In the *Achtner* case, the company had a right to initiate its own security policies and exclude aliens as employees, and therefore had the right to inquire as well as an adequate reason for ascertaining the defendant's citizenship, since it was related to their employment practices. Employment depended upon citizenship. In the *De Pratu* case, the law gave the authority and imposed the affirmative duty upon the officers inquiring to ascertain citizenship status; the law there made citizenship a condition precedent to favorable action in each of the instances involved.

In all of the reported cases, citizenship was material to the transaction and subject matter under consideration because the end result would or could have been different, depending upon whether the individual was alien or citizen.

Justice Sanborn in *Sweet v. United States, supra,* said:

> "It is a familiar rule of construction that every decision of a Court should be considered and given effect in the light of the facts which conditioned it."

Not only the *De Pratu* case, but the cases of *United States v. Tenderic,* 152 F. 2d 3 or *United States v. Weber,* 71 Fed. Supp. 88, were not distinguished or even discussed in Appellee's brief.

POINT II.

(Error II.)

The Verdict Was Inconsistent With, Contrary and Repugnant to the Court's Instructions.

Appellee makes no answer whatsoever to this point.

POINT III.

(Error III.)

The Court Erred in Permitting Testimony Concerning the Comity Arrangements of Public Authorities in Exchanging Information Concerning Arrestees.

This point is discussed as Point III of the Government's Brief, page 19; it is discussed in our Opening Brief at pages 28-30.

Appellee's sole Answer is that "when the law exempts from criminality mere boasts, jests, or words uttered to stop the prying of some busybody, it certainly admits evidence to disclose that real use is made of the information elicited and that the inquiry is in the course of regular business."

The law does not alone exempt from criminality mere boasts, jests or words uttered to stop the prying of some busybody; it also exempts from criminality cases not involving the "right in law in furtherance of official authority and duty" to inquire and false answers as to citizenship, not material to "the transaction at hand" and "mere untruths" not made "with intent to defraud," and those not "made with intent to deceive * * * as to a material matter," etc.

This case is entirely unlike the *Achtner, De Pratu, Tenderic* cases or any reported case; all of the cases in the books were conditioned upon facts showing the right legally to inquire as to citizenship and its materiality to the subject matter; further all of the cases showed the perpetration of fraud and that the end result would or could have been different if the true nationality status were disclosed.

A business survey may have a good reason to inquire concerning nationality status, or even a neighbor, but the law does not impose upon the individual interrogated the obligation to truthfully answer. This need only be done when an adequate reason and legal right to inquire exists, and, if it is material to the subject matter. Under Appellee's theory evidence would be proper to disclose that a survey agency made real use of the information elicited, *i. e.,* supplied it as a service to department stores, to periodicals, etc.

On the sole theory of showing appellant gained an advantage this testimony was offered and received. It of course showed none under the record in this case and needed the unfair argument of the prosecution based on pure speculation to give it implementation.

A fair trial required a trial free from this irrelevant evidence and speculative argument based thereon.

POINT IV.

(Error IV.)

The Court Should Have Given to the Jury Appellant's Instructions No. 27 and No. 30.

This point is discussed as Point IV of the Government Brief, pages 20-21; it is discussed in our Opening Brief at page 31.

Appellee's only answer on this point is that "the interrogation was not an inquiry into an alleged violation of gambling laws." The interrogation however arose out of and in connection with an arrest for a gambling violation. If it were not material to that transaction the jury should have been so told and the issue not left to speculation. Appellee not only fails to answer our position on this point, but fails to distinguish or even discuss the cases cited in support of our contention.

POINT V.

(Error V.)

There Was Error in Overruling Appellant's Motion to Dismiss the Indictments.

This point is discussed as Point I of the Government's Brief, pages 12-14; it is discussed in our Opening Brief as our last point at pages 32-34.

While we have de-emphasized this point by making it our Point V, the Government emphasizes it and makes it their Point I. As to our grounds (a) and (b), we stated in our Opening Brief that the case of *United States v. De Pratu, supra,* as to the sufficiency of the allegations of the indictment, indicated to us that this Court would hold

here against us on these grounds; but that we presented it again for reconsideration of the Court, as we desired to preserve this point in the light of the opinions of two other Courts of Appeals and a District Court:

United States v. Achtner (C. C. A. 2), 144 F. 2d 49;

United States v. Henderic (C. C. A. 7), 152 F. 2d 3;

United States v. Weber, 71 Fed. Supp. 88.

The contentions advanced on the second ground are answered by the Government by the statement that an indictment in the language of this statute is sufficient.

In neither the *De Pratu* case or the *Achtner* case was our second ground before the Court. In fact, to our knowledge, these contentions have not been answered by this or any other Court.

As we have seen, one may under certain circumstances answer untruthfully as to his citizenship without violating this statute. The Appellee in its Brief at pages 16-17, concedes that not all false representations that one is a citizen violates the statute. Therefore, we are governed by the principle as stated in *United States v. Fontana* (C. C. A. 8), 262 Fed. 283, 288:

> "It is an elementary rule of criminal law that when language does *not* constitute a crime if uttered under some circumstances, and *does* constitute a crime if uttered under other circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, so the court can determine, and not the pleader, whether or not they constitute the crime. U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516."

Conclusion.

For each and all of the reasons set forth in our Opening Brief, it is submitted that the judgment should be reversed.

Respectfully submitted,

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